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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH J. IMHOFF, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners[1] seek review of the decision below determining a deficiency in their federal income taxes for 1973, on the ground that the Commissioner's attorney obtained a continuance through a factual misrepresentation.

The pertinent facts may be summarized as follows: On audit of petitioners' federal income taxes for 1973, the Commissioner determined a deficiency of $8,978 based on the disallowance of approximately $18,000 in miscellaneous deductions claimed, inter alia, for depreciation on

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[1]Joseph J. Imhoff and Edith M. Imhoff were married in 1973 and filed a joint federal income tax return for that year. They jointly petitioned the Tax Court for a redetermination of the deficiency asserted against them for that year, and they are referred to as "petitioners". In April 1980, Edith Imhoff died, and the co-executors of her estate were substituted as a party.

their large home, for utility expenditures, and for salaries paid persons employed in maintaining their residence. Petitioners sought redetermination of the deficiency in the Tax Court, appearing pro se. Following petitioners' refusal to participate with the Commissioner's attorney in preparing a stipulation of facts required by Rule 91(a) of the Tax Court Rules, and in response to the Commissioner's motion for an order to show cause why certain facts should not be admitted, Judge Quealy, at a motions session in Washington, D.C. on February 1, 1978, directed petitioners to present to the Commissioner's attorney by February 10, 1978, evidence showing they had in fact incurred the expenses for which they claimed the disputed deductions. Judge Quealy further directed the Commissioner's attorney to prepare a stipulation listing amounts paid, to whom paid, and for what purpose payments were made, and to report to the court by February 17, 1978. The court advised the parties that if they complied with its direction, the case would be tried on February 21, 1978, in Philadelphia. However, the court orally warned the parties that if either side failed to comply with his direction, he would dismiss the case in favor of the other side (A. 1-10, 44; Doc. A at 2).[2] On February 9, 1978, petitioners presented their evidence to the Commissioner's attorney. On February 15, 1978, at a trial calendar in Philadelphia, the Commissioner's attorney reported to Judge Quealy, in petitioners' absence, that petitioners had presented their evidence but had requested a continuance of trial because of Mrs. Imhoff's illness. Judge Quealy thereupon continued the proceedings (Pet. 3-4; Pet. App. A3-A5, A44-A45, A51). Petitioners were promptly notified of the order granting a continuance of trial and raised no objection (A. 11-12; Doc. A at 2).

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[2] "A." references are to the separately bound record appendix filed by petitioners with the court of appeals. "Doc." references are to the document numbers assigned by the Clerk of the Tax Court to the documents not included in petitioners' appendix.

The case was reassigned for trial before Judge Scott at a subsequent trial calendar in Philadelphia. Petitioners sought to have the case dismissed in their favor on the alleged grounds that the Commissioner's attorney had not prepared the stipulation by the date set by Judge Quealy, and that the attorney's representation to the Court that petitioners had requested a continuance was false. Judge Scott denied petitioners' motions to that effect, explaining that she now had jurisdiction over the case and that she was not going to dismiss the case with a determination of no deficiency, but would try the case on the merits. After a full trial, Judge Scott allowed some claimed deductions and disallowed others, and accordingly redetermined the deficiency to be $6,675 (Pet. App. A55; A53; A30-31).[3]

On appeal, petitioners did not challenge the correctness of the decision on the merits, but argued only that the alleged misrepresentation by the Commissioner's attorney constituted fraud on the court and, therefore, that the court should have dismissed the case in favor of petitioners. The court of appeals affirmed. It concluded that the Tax Court did not abuse its discretion in refusing to dismiss the deficiency on account of the alleged misrepresentation (Pet. App. A1-A2).

1. The decision below correctly held that the Tax Court did not abuse its discretion in refusing to dismiss the case in

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[3]Judge Scott subsequently denied petitioners' motion for reconsideration out of time or dismissal. That motion argued that petitioners should be afforded the opportunity to prove the falsity of the statement made by the Commissioner's attorney on February 15, 1978. Attached to the motion was an affidavit executed by Joseph Imhoff in which he stated that petitioners had not sought a continuance in accordance with the representation of the Commissioner's attorney.

petitioners' favor, and enter a decision of no deficiency.[4] Cf. *H.K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976); *Wilken* v. *Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973); *Stickler* v. *Commissioner*, 464 F.2d 368, 369-370 (3d Cir. 1972). Judge Scott, to whom the case was reassigned for trial, was under no compulsion, legal or otherwise, to carry out the prior judge's oral admonitions regarding his stipulation order. It was fully within Judge Scott's discretion to decide, as she did, to determine the case on the merits, after affording petitioners a full trial where they had every opportunity to put into the record any evidence they had in support of their claimed deductions.

2. The alleged misrepresentation[5] did not constitute a fraud upon the court requiring the Tax Court's decision to be set aside. Assuming arguendo the truth of petitioners' allegation, we agree that obtaining a continuance with a deliberate factual misrepresentation would be inexcusable behavior by any officer of the court. *Birnholz* v. *United States*, 199 Ct. Cl. 532, 537 (1972). But, in order to constitute "fraud on the court" for purposes of setting aside the Tax Court's decision, the fraudulent conduct must have either improperly influenced the court in its decision (*Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978); *England* v. *Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)), or "prevented the losing party from fully and fairly presenting his case or defense." *Toscano* v. *Commissioner*, 441 F.2d

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[4] A decision of the Tax Court dismissing the proceeding is considered a decision that the deficiency is in the amount determined by the Secretary. See Section 7459(d) of the Internal Revenue Code of 1954 (26 U.S.C.). What petitioners actually seek is a default judgment against the Commissioner, i.e., a determination of no deficiency.

[5] The Tax Court received no evidence and made no findings with regard to petitioners' allegations of willful misrepresentation.

930, 934 (9th Cir. 1971); *Luttrell* v. *United States*, 644 F.2d 1274, 1276 (9th Cir. 1980); *Pfizer, Inc.* v. *International Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976).

3. *Hazel-Atlas* v. *Hartford Co.*, 322 U.S. 328 (1944), upon which petitioners rely (Pet. 6-9), is not to the contrary. There, this Court recognized the significant part that the fraudulent article played in influencing the court of appeals' decision holding the patent valid and infringed. As the Court stated (322 U.S. at 246): "Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion." See also 322 U.S. at 241.[6]

Indeed, the definition from 7 J. Moore, *Moore's Federal Practice* para. 60.33, at 515 (1977), which was utilized by the court of appeals and cited by petitioner (Pet. 8), likewise stated:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can

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[6]The Court in *Hazel-Atlas* also emphasized (322 U.S. at 249) that its holding was limited to the record presented, where the fraud was undisputed. As the Court noted (*id.* at n.5), "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses."

Here, on the other hand, the charges of fraud have not been proven. The Commissioner was not given the opportunity to respond to the petitioners' factual allegations in the Tax Court, because the court did not view them as affecting the trial on the merits. Thus, petitioners' first two motions alleging the misrepresentation were made and denied orally in the course of the trial (A. 13-14, 16-18). Petitioners' final motion for reconsideration (A. 19-36) was filed on September 2, 1981, and denied by the court on September 3, 1981 (A. 19).

not perform in the usual manner its impartial task of adjuding cases that are presented for adjudication.

Kerwit Medical Products, Inc. v. *N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973); *Kupferman* v. *Consolidated Research and Manufacturing Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *Kenner* v. *Commissioner*, 387 F.2d 689, 691 (7th Cir. 1968); *Great Coastal Express* v. *International Brotherhood of Teamsters*, 86 F.R.D. 131, 139 (E.D. Va. 1980).[7] Professor Moore's definition affirms that the fraud must affect the court in its decisional process. Here, there was no claim by petitioners that the alleged misrepresentation in any way prevented them from fully and fairly presenting their case, or in any way influenced the court in its decision.

Finally, the remedy ordered in *Hazel-Atlas*, in which the original judgment secured by Hartford was vacated, would under no circumstances be appropriate in this case. In *Hazel-Atlas*, the fraud perpetrated by Hartford went to the merits of Hartford's claim, i.e., it essentially nullified the validity of its patent, and, thus, its infringement claim. Here, to the contrary, the alleged fraud related to a procedural matter only and had no effect on the merits of the case. Indeed, it was established in a trial without substantive error that petitioners were not entitled to all the deductions claimed and that there is a deficiency in their tax. They have shown no basis for overturning that determination.

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[7]Although *H. K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976), refers only to dishonest conduct of attorneys, it cites *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, *supra*, which in turn cites the above definition from Moore.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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